Cooper

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crux Computer Corp.

File: B-234143

Date: May 3, 1989

DIGEST

1. The submission of a below-cost or low-profit offer is not illegal and provides no basis for challenging the award of a firm-fixed-price contract to a responsible contractor.

2. Contracting officer's affirmative determination of responsibility was reasonable where it was based on acceptable contractor performance history on a similar item.

3. Protest that awardee will not provide certain commercial software to the agency with complete licenses as required by the RFP is denied where awardee's offer conformed to the terms of the solicitation; whether or not the awardee in fact meets that obligation is a matter of contract administration.

4. Contracting officer's determination that adequate price competition has been obtained, and thus that certified cost and pricing data is not required, is reasonable where the record does not support the conclusion that any offeror is immune from competition, and in any case, the outcome of the competition would not have been changed.

DECISION

Crux Computer Corp. protests the award of a contract to EG&G Washington Analytical Services Center, Inc., under request for proposals (RFP) No. F34601-87-R-14750, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma, for a hardness evaluation system (HES), a testing system used to support electromagnetic pulse tester and surveillance systems that evaluate certain effects of nuclear explosions on weapons systems. Crux argues that the Air Force should have rejected EG&G's offer as unreasonably low and should have required EG&G to submit certified cost and pricing data, and that EG&G will not provide certain

commercial software to the government on an unrestricted basis as required by the RFP. Crux also asserts that the Air Force should have suspended contract performance since the contract was allegedly awarded to EG&G only 3 days before Crux protested to our Office.

We deny the protest.

The RFP, issued on April 1, 1988, requested an HES and related data and warranty for a base period with three 1-year options, and contemplated the award of a firm-fixed-price contract. The RFP stated that offerors were to submit technical and cost proposals, and that award would be made to the lowest priced technically acceptable offeror. Offerors were to provide the government with unlimited/unrestricted rights to all non-commercial contractor-developed HES software and "complete licenses" for all commercial software. The Air Force received two offers by the August 31 closing date. Both offerors were found to be technically acceptable. Best and final offers were received on December 19 and a notice of award was sent to EG&G on December 30 at an evaluated price of $2,968,856.24 for all items (including estimated option year prices). Crux offered an evaluated price of $4,297,917. Crux became aware of the notice of award on January 3, 1989, and protested to our Office on January 13. The Air Force did not suspend performance of the contract.

Crux first protests that the contract award to EG&G is improper because EG&G's proposed price was unreasonably low. Crux asserts that this indicates that EG&G either did not understand the requirements of the RFP and so will not be able to comply with the RFP's technical requirements, or that EG&G intentionally submitted a below-cost proposal with the expectation of recouping its losses on other sole-source cost-reimbursement contracts.

As a preliminary matter, the submission of a below-cost or a low-profit offer, as Crux alleges EG&G has done here, is not illegal and provides no basis for challenging the award of a firm-fixed-price contract to a responsible contractor since it is the offeror's loss and not the government's if the cost of performance exceeds the contract price. Advanced Technology Systems, Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315.

To the extent that Crux asserts that EG&G cannot perform at its offered price, Crux is challenging the Air Force's determination that EG&G is a responsible contractor. In essence, Crux argues that, in view of EG&G's low price, the Air Force did not conduct an adequate review to determine

whether EG&G is capable of providing a conforming system at that low price. Our Office does not consider challenges to affirmative determinations of responsibility unless there is a showing of fraud or bad faith on the agency's part or that definitive responsibility criteria in the solicitation were not met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1988); Space Communications Co., 66 Comp. Gen. 2 (1986), 86-2 CPD ¶ 377. Crux does not contend that the RFP contained definitive responsibility criteria, and the record contains no indication of fraud or bad faith by the Air Force.

The agency based its determination of EG&G's responsibility on the firm's previous acceptable performance on an Air Force contract for a similar item, a portable HES. The fact that the Air Force did not conduct a preaward survey in order to investigate EG&G's capability to perform more fully does not demonstrate that the Air Force acted in bad faith. On the contrary, the extent of review necessary before making a responsibility determination is within the contracting officer's discretion, see Nations, Inc., B-220935.2, Feb 26, 1986, 86-1 CPD ¶ 203, and the agency was not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility, as was the case here. Automated Datatron Inc., B-232048, Nov. 16, 1988, 68 Comp. Gen. ____, 88-2 CPD ¶ 481.

Crux also argues that the Air Force should have rejected EG&G's offer because the protester believes that EG&G will not provide certain commercial software to the government with complete licenses as required by the RFP.

Our review of the record indicates that the Air Force, on September 19, and again on November 3, asked EG&G to clarify its proposal as to its commitment to supply the required licenses. EG&G responded that it would meet all requirements of the RFP, specifically noting that it would provide the Air Force with restricted-rights licenses for all commercially available software, and unlimited/ unrestricted rights to all non-commercial, EG&G-developed software. Under the RFP, offerors were not required to provide the Air Force with unrestricted rights to the commercial software for the HES; rather, they were to provide complete, i.e., all necessary licenses for the Air Force for each piece of commercial software. Accordingly, we find that EG&G did offer to provide commercial software with complete licenses in accordance with the RFP. Whether or not EG&G in fact meets that obligation is a matter of contract administration which our Office does not review. 4 C.F.R. § 21.3(m)(1).

Crux next argues that EG&G's access to certain software EG&G developed for a previous, similar, Air Force contract that was not made available to other offerors by the Air Force gave EG&G such a decided advantage that EG&G was immune from competition from other offerors and, as a result, certified cost and pricing data should have been required since adequate price competition did not exist, and a price or cost analysis should have been conducted. Crux maintains that either the software in question should have been made available to all offerors, or the Air Force should have issued the RFP on a sole-source basis to EG&G and not induced Crux to prepare an offer which could not possibly be competitive.

A certificate of current cost or pricing data is generally not required when the contracting officer determines that prices submitted are based on "adequate price competition." Federal Acquisition Regulation (FAR) § 15.804-3(a)(1). Price competition exists if two or more offerors submit offers meeting the government's requirements and the contract is to be awarded to the offeror submitting the lowest evaluated price. FAR § 15.804-3(b). If price competition exists, the contracting officer is to presume it is adequate, unless, among other conditions, the low offeror has such a decided advantage that it is practically immune from competition. FAR § 15.804-3(b)(2)(ii). Moreover, a price or cost analysis generally is concerned with whether an offeror's prices are higher than warranted considering its costs and is used in negotiating reasonable prices. Digital Equipment Corp., B-219435, Oct. 24, 1985, 85-2 CPD ¶ 456. An agency need not require cost or pricing data for the purpose of determining whether offered prices are too low. Ebonex, Inc., B-213023, May 2, 1984, 84-1 CPD ¶ 495.

In our view, the record supports the contracting officer's determination that adequate price competition was obtained. First, two offerors submitted proposals that met the government's requirements and the contract was awarded to the offeror submitting the lowest price. Although EG&G may have had a competitive advantage as the developer of software for the portable HES, the record does not show that that advantage made EG&G immune from competition and thus that submission of certified cost or pricing data was required. Although Crux asserts as support for its position that EG&G's offer on the line item for data supporting the HES was only $37,172, while Crux's was $563,427, that differential alone does not lead to the conclusion that EG&G was immune from price competition, when the differential between the two offers was $1,329,060.76. Thus, even if Crux were to show that the contracting officer should have required certified cost or pricing data, we do not see how

that requirement would have changed the outcome of the competition. Secondly, Crux alleges that EG&G's prices were too low, not too high, so the Air Force was not required to perform a price or cost analysis.

In addition, to the extent that Crux is arguing that the Air Force should have conducted a sole-source procurement because of EG&G's access to the portable HES software, nowhere in the record is there evidence that the Air Force found that the requirements of this RFP could only be fulfilled by EG&G, so that a sole-source award could be justified. To the extent that Crux is actually arguing that EG&G had an advantage due to its prior development of the portable HES, a particular offeror may possess unique advantages and capabilities due to its prior experience under a government contract and the government is not required to attempt to equalize competition to compensate for it, unless there is evidence of preferential treatment or other improper action. S.T. Research Corp., B-233309, Mar. 2, 1989, 89-1 CPD ¶ ____. We have not found any evidence of such preferential treatment or improper action on the part of the Air Force.

Crux's final argument concerns the fact that the Air Force did not suspend contract performance following the firm's protest to our Office. First, since we have denied the protest, Crux would not have been prejudiced if the Air Force's failure to suspend performance was improper. In any event, the record shows that the actual award was made more than 10 calendar days prior to the protest so the Air Force was not required to suspend performance of EG&G's contract. 4 C.F.R. § 21.4(b). According to the Air Force, the award date on the contract which gave rise to the protester's argument was an error. Since the record includes a notice of award dated prior to the award date on the contract, the agency's explanation appears reasonable.

The protest is denied.

James F. Hinchman
General Counsel